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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 62

"JOACHIM HENDRIK FISSER", HER ENGINES, TACKLE, APPAREL, ETC., PETITIONER

v.

NACIREMA OPERATING CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (R. 14–39) is reported at 142 F. Supp. 389. The opinion of the United States Court of Appeals for the Third Circuit (R. 109–114) is reported at 249 F. 2d 818. The *per curiam* opinion of the Court of Appeals on the petition for rehearing (R. 129) and the dissenting opinion (R. 130) are reported at 249 F. 2d 821.

JURISDICTION

The judgment of the Court of Appeals was entered on September 30, 1957 (R. 114–115). A timely peti-

tion for rehearing was denied on December 5, 1957 (R. 131). The time within which to file a cross-petition for a writ of certiorari was extended to and including May 2, 1958, by order of Mr. Justice Brennan, dated March 1, 1958 (R. 132). The cross-petition for a writ of certiorari (No. 62) was filed on May 1, 1958, and granted on June 9, 1958 (R. 133; 357 U. S. 903). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a ship which has been chartered out to a third party, and has become liable *in rem* to a longshoreman as a result of his stevedoring employer's failure properly to perform its service agreement with the third party, may obtain reimbursement from the stevedoring company whose breach of contract gave rise to the liability.

STATEMENT

This proceeding *in rem* against the *S. S. Joachim Hendrik Fisser* was brought in admiralty by John H. Crumady, a longshoreman, to recover for personal injuries sustained when a boom fell upon him while the vessel was being unloaded at a berth in Port Newark, New Jersey (R. 7). The vessel at that time had been chartered out by its owners to Ovido Compania Naviera S. A. Panama (Ovido),[1] which company, through its agent, Insular Navigation Company (Insular), had entered into a stevedoring service agreement with

[1] The record does not disclose the nature of the chartering arrangement, *i. e.*, whether it was a bare-boat, time, space or voyage charter. We believe that the result would be the same in any case.

Nacirema Operating Company (Nacirema), Crumady's employer, with respect to the "discharging and/or loading of vessels owned, operated or otherwise controlled by Insular * * * at the Port of Port Newark, New Jersey * * * " (R. 32, 96–97).[2] The ship impleaded Nacirema on the ground that the sole cause of libelant's injuries, and of the asserted liability of the ship to libelant, was Nacirema's improper performance of the unloading operation and, since Nacirema had contracted to perform these stevedoring duties in a skillful manner, it was required to reimburse and indemnify the ship for any damages found against the ship resulting from Nacirema's breach of this contractual duty (R. 14, 16).

The District Court found that Crumady's accident was caused solely by the negligent manner in which Nacirema's employees sought to extract certain long and heavy timber from the hold—more particularly, the improper positioning of the head of the boom by the stevedore's employees which resulted in a strain upon the lifting gear, its parting, and the consequent fall of the boom (R. 32). The District Court held that the stevedoring contractor's failure to exercise reasonable care in conducting the unloading operation "brought into play the unseaworthy condition of the vessel for which the latter would be liable in damages * * *" (R. 33).

The court further held that the ship was entitled to be reimbursed by Nacirema for the damages it was required to pay, since it was Nacirema's negli-

[2] Neither Ovido nor Insular was made a party to this litigation.

gence which constituted the "sole, active or primary cause" of the fall of the boom (R. 33). The court stated that, because Nacirema had entered into a stevedoring service agreement with the charterer of the vessel, through the charterer's agent, there was no direct contract between the owner of the vessel and Nacirema, upon which to ground the vessel's right to be reimbursed and indemnified.* Nevertheless, the court held that indemnification was warranted since "Entirely apart from its obligation under its contract with the agent for the charterer of the respondent vessel, Nacirema owed the vessel and her owners the duty of using due care in her unloading" (R. 33).

The Court of Appeals, ruling that there was no liability on the part of the ship to the injured longshoreman, reversed the judgment of the lower court. It agreed with the District Court that "the sole active or primary cause" of the accident was the improper positioning of the head of the boom by the stevedoring crew (R. 113). The Court of Appeals held, however, that this did not render the ship's gear unseaworthy; that "seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose", and that there was no proof, in this record, that the gear was unseaworthy (R. 113–114). The court's disposition of the case thus made it unnecessary to reach the issue of indemnification. A petition for rehearing was denied, Biggs, C. J., dissenting.

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*The court did not discuss the ship's theory "that the shipowner was a third part[y] beneficiary of this contract" (R. 107).

INTEREST OF THE UNITED STATES

In *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, where the United States appeared as *amicus curiae*, this Court held that a shipowner, which had entered into a service agreement with a stevedoring company, was entitled to indemnification for all damages it sustained as a result of the stevedoring contractor's breach of its warranty of workmanlike service. This conclusion was reaffirmed by the Court in *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563, in which the United States also appeared as *amicus curiae*. As in *Ryan* and *Weyerhaeuser*, the United States, as the world's largest shipowner, is directly interested in the indemnification problem raised by the cross-petition in No. 62, *i. e.*, whether a ship which has been chartered out to a third party, and has become liable *in rem* to a longshoreman as a result of his stevedoring employer's failure properly to perform its service agreement with the third party, has a direct right to recover reimbursement from the stevedoring company whose breach of contract gave rise to the ship's liability. Since the United States frequently charters out its own vessels and also time-charters privately operated vessels to carry Government cargoes, and acts as a self-insurer in respect of many of these different types of operations, it has a special financial interest in the resolution of this legal problem.

SUMMARY OF ARGUMENT

In the event that this Court should reverse the judgment of the court below (in No. 61) and hold the ship liable for the injuries which the stevedore's negligence inflicted on the longshoreman—an issue upon which the Government takes no position in this brief—it is our view that the ship is entitled to be reimbursed by the stevedoring company for the judgment it will be required to pay. Although both courts below are in full agreement that the negligence of the stevedoring company was the "active or primary" cause of the accident, we think it is unnecessary for this Court to resuscitate such concepts, peculiar to the law of quasi-contractual or tort indemnity,[4] in order to justify the stevedoring contractor's duty of reimbursement in this case. Rather, reimbursement may be predicated simply on the contractual theory that the vessel—which under *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, is charged with the nondelegable duty of properly conducting its loading and unloading operations—must be regarded as an intended beneficiary of any service contract, involving those operations, entered into between a charterer of the vessel and the stevedoring company.

It is wholly unrealistic to contend, as does the stevedoring company here, that its contractual duty to perform the unloading operation in a workmanlike manner was not owed to the vessel itself, which may be held responsible in damages for a violation of that

[4] See *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124, 132–133.

duty, but exclusively to the charterer of the vessel and its agent. In this connection, we point out that the third-party-beneficiary doctrine is no stranger to the maritime law, and that, in the circumstances of this case, an argument grounded upon strict notions of "privity of contract," while having the merit of simplicity, is calculated to permit an unjust and inequitable result, *i. e.*, the saddling of the ship with a loss brought about solely by the stevedoring company's improper performance of its contractual obligations skillfully to stevedore the ship. We point out additionally that to allow the vessel to obtain reimbursement directly from the stevedoring company will accomplish the desired result of avoiding circuitous actions. This follows from the fact that the charterer is liable to the owner of the vessel for the creation of a lien upon the vessel during the term of the charter (just as it would be liable to reimburse the owner for a personal liability caused during the term of the charter), and the charterer in turn can recover from the contracting stevedore whose breach of contract created the lien.

ARGUMENT

A SHIP WHICH IS HELD LIABLE IN DAMAGES TO AN INJURED LONGSHOREMAN IS ENTITLED TO REIMBURSEMENT FROM THE STEVEDORING COMPANY WHOSE BREACH OF CONTRACTUAL DUTY TO UNLOAD THE SHIP SAFELY AND PROPERLY GAVE RISE TO THE LIABILITY [5]

A. THE VESSEL IS A THIRD-PARTY BENEFICIARY OF THE STEVEDORING CONTRACT.

There is no question, as both courts below have found, that the sole cause of the longshoreman's injury was the improper manner in which the stevedoring contractor, Nacirema, conducted its unloading operation on board the vessel (R. 32, 33, 113). Nor can there be any question that the improper performance of the unloading operation constituted a breach of Nacirema's contractual undertaking "to faithfully furnish such stevedoring services as may be required * * *" (R. 97). *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.*, 350 U. S. 124; *Weyerhaeuser S. S. Co.* v. *Nacirema Co.*, 355 U. S. 563. Moreover, Nacirema will not dispute that, under this Court's decisions in *Ryan* and *Weyerhaeuser*, it would be obligated at least to discharge the charterer of the vessel, Ovido, of all foreseeable damages resulting from Nacirema's breach of its contractual undertaking properly to stevedore the ship. Finally, the stevedoring contractor cannot contend that the damages which may be cast upon the vessel as a result of the stevedore's breach of contract are any less foreseeable, or differ

[5] Our argument in this brief is premised on the assumption that the Court reverses the judgment below in No. 61, *Crumady* v. *"Joachim Hendrik Fisser," etc., et al.* We take no position in this brief on the issues in No. 61.

in any respect, from those which may be cast upon the charterer of the vessel.

Nacirema argues, nevertheless, that it is not obligated to discharge the vessel directly of those same damages, resulting from its breach of its duty to stevedore the vessel skillfully, because its contract was not entered into expressly on behalf of the vessel, or her owners, but only on behalf of her charterer.[6] And, since the charterer of the vessel is not included as a party to this litigation, the argument continues, the stevedoring company is entitled to escape from the satisfaction of its contractual obligation.

But there is no real or substantial reason why the vessel should not be regarded as a third-party beneficiary of the stevedoring contract.[7] The third-party beneficiary doctrine has been frequently applied in the maritime law, *e. g.*, third-party beneficiaries of marine insurance policies—*Hagan* v. *Scottish Ins. Co.*, 186 U. S. 423; *The John Russell*, 68 F. 2d 901 (C. A. 2); *Munich Assur. Co.* v. *Dodwell & Co.*, 128 Fed. 410 (C. A. 9), certiorari denied, 195 U. S. 629; third-

[6] We think it is significant to note, at the outset, that Nacirema's attempt to disassociate the contractual responsibilities it owed to the charterers of the vessel from those owed to the vessel and its owners is somewhat undercut by the express admission of Nacirema, in its answer to Crumady's libel, "That at all times herein mentioned Joachim Hendrik Fisser and Hendrik Fisser or either of them operated said ship, 'Joachim Hendrik Fisser' *through their agents, servants or employees.*" (Emphasis added.)

[7] The stevedoring contract is a maritime contract. *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 61–62; *American Stevedores* v. *Porello*, 330 U. S. 446, 456.

party beneficiary of covenant to repair dock—*O'Rourke* v. *Peck*, 29 Fed. 223 (S. D. N. Y.); third-party beneficiary of warranty of seaworthiness—*Petition of Reliance Marine Transp. & Const. Corp.*, 89 F. Supp. 272, 277 (D. Conn.).* And in this case, the circumstances surrounding the stevedoring contract between Nacirema and the charterer of the vessel clearly indicate that the vessel itself is to be regarded as an intended beneficiary of the stevedoring company's warranty of workmanlike service. It follows that the foreseeable expenses to the vessel, resulting from Nacirema's breach of its warranty of skillful performance, measures its liability. See Brief for the United States as Amicus Curiae in *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, No. 75, Oct. T. 1957, pp. 16–19.

Modern contract law recognizes that "intention" refers to the necessary effect of the contract, and not to the subjective motives of the parties in making the contract. *Restatement of the Law of Contracts*, Sections 20–23; Note, *Third Party Beneficiary Concept*, 57 Col. L. Rev. 406, 409 (1957). In the instant case, by contracting with the vessel's charterer to conduct the vessel's unloading operation in a safe and proper manner, the stevedoring company nevertheless was still performing, on behalf of the *vessel*, a duty—nondelegable in nature—for whose breach the vessel remained responsible. *Seas Shipping Co.* v. *Sieracki*,

* For general discussion of third-party beneficiaries, see Corbin, *On Contracts* (1951 Ed.), Vol. 4, Sections 772–855; Williston, *Contracts* (Rev. Ed.), Vol. 2, Sections 347–403; *Restatement of the Law of Contracts*, Sections 133–147.

328 U. S. 85. The necessary effect of a breach of the stevedore's contractual undertaking, therefore, was to subject the vessel to liability. In other words, it was clearly within the contemplation of the parties at the time the contract was entered into that, if the stevedoring company made the vessel unseaworthy and thereby caused injury to a stevedore employee, the vessel would be cast in damages for the full amount of this injury. *Ibid; States S. S. Co.* v. *Rothschild International Stevedoring Co.*, 205 F. 2d 253 (C. A. 9).[9] In these circumstances, it seems clear that the vessel must be regarded as an intended beneficiary of the stevedoring company's contractual obligation. In this area of the law, arguments based upon strict privity of contract are wholly unrealistic.[10]

By allowing the vessel itself to recover as a beneficiary of the stevedoring contract for its unloading,

[9] In that case, the stevedoring company had also been hired by a charterer, and not by the ship. The court nevertheless held that the stevedore owed the ship a duty to refrain from negligent practices which would subject the ship to liability to third parties. We think the court's result could just as easily have been grounded upon the third-party beneficiary doctrine. See, also, *Allen* v. *States Marine Corporation of Delaware*, 132 F. Supp. 146 (S. D. N. Y.), which was relied upon by the District Court here in awarding indemnification (R. 34–35).

[10] Indeed, it could be forcefully argued that, even if privity of contract were necessary, it was supplied by the relationship of the parties with respect to the non-delegable duty being performed by the stevedoring company. Cf. Benedict, *Admiralty* (6th Ed.), Vol. 1, p. 23. It would appear, for example, that the stevedoring contractor could establish a lien upon the vessel if the charterer failed to perform its part of the contract. *Ibid.*

the third-party beneficiary concept is kept within well-defined boundaries. The vessel is obviously identifiable at the time performance under the contract is due; it certainly cannot be regarded as a member of an indeterminate or general class. Cf. *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160; see Corbin, *On Contracts*, Vol. 4, Section 781. The vessel's interest in the proper performance of the stevedoring contract for its own unloading is no greater than that of the charterer of the vessel. And the risk of defective performance which is assumed by the stevedore contractor is not increased by allowing the vessel to recover under the contract. See *supra*, pp. 8–9. All of these factors demonstrate, we believe, the propriety of permitting the vessel to recover directly as a third-party beneficiary."[11] There is, moreover, an additional and compelling reason for allowing reimbursement in this case.

B. PERMITTING THE VESSEL DIRECTLY TO OBTAIN REIMBURSEMENT FROM THE STEVEDORING COMPANY AVOIDS CIRCUITY OF ACTIONS.

By proceeding *in rem* against the vessel, the libelant seeks to subject the vessel to a maritime lien for having breached a duty owed to him. It is undisputed,

[11] See Corbin, *On Contracts*, Vol. 4, Section 779G: "As the beneficiaries who assert rights under a contract become more remote from the contracting parties, as their number increases and their identity becomes less certain, and as the interests asserted by them become more complex, the greater is the probability that the courts will not sustain suits in their behalf."

In this case, as we have shown above, it cannot be seriously argued that (1) the vessel is a remote beneficiary; (2) its identity is uncertain; or (3) its asserted interest is more complex than that of its charterer.

however, that at the time of the injury the vessel had been chartered out to Ovido which was bound to return the vessel to its owners free from any maritime lien arising from its use of the vessel during the term of the charter. *The Barnstable,* 181 U. S. 464; *Eastern Mass. Street Ry. Co.* v. *Transmarine Corp.,* 42 F. 2d 58 (C. A. 1), certiorari denied, 282 U. S. 883; *United States* v. *The Helen,* 164 F. 2d 111 (C. A. 2); *The No. K 1,* 150 Fed. 111 (C. A. 2). As Mr. Justice Brown stated in *The Barnstable, supra,* at 468–469:

> This, indeed, is but the application to charter parties of the ordinary law of bailment, which requires that the bailee return the property to the owner in the condition in which it was received, less the ordinary results of wear and tear, and such injuries as are caused by a peril of the sea, or inevitable accident.

Accordingly, the owners of the vessel—who appear in this *in rem* proceeding only as claimants of the vessel—would be entitled to hold Ovido responsible for the lien created on the vessel as a result of its use during the charter term. There can also be no doubt that Ovido would be entitled, in turn, to throw its loss back on the stevedore, whose breach of contract created the maritime lien. *Ryan Stevedoring Co.* v. *Pan-Atlantic Corp.,* 350 U. S. 124; *Weyerhaeuser S. S. Co.* v. *Nacirema Co.,* 355 U. S. 563; see *United States* v. *The Helen,* 164 F. 2d 111, 112 (C. A. 2d). Hence, by allowing the vessel directly to obtain reimbursement from the stevedoring company in this proceeding, the much desired result—especially in admiralty—of avoiding circuitous actions is accom-

plished. See *W. R. Grace & Co.* v. *Charleston Lighterage & Transfer Co.*, 193 F. 2d 539, 544 (C. A. 4); *Cannella* v. *Lykes Bros. S. S. Co.*, 174 F. 2d 794, 796 (C. A. 2); cf. *British Transport Commission* v. *United States*, 354 U. S. 129; *Hartford Accident Co.* v. *Southern Pacific Co.*, 273 U. S. 207.

CONCLUSION

In the event that this Court should reverse the judgment of the Court of Appeals in No. 61, it is respectfully submitted that the judgment of the District Court awarding indemnification to the vessel should be reinstated.

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